No. 77-681

In the Supreme Court of the United States

OCTOBER TERM, 1977

TAX ANALYSTS AND ADVOCATES AND THOMAS F. FIELD,
PETITIONERS

v.

W. MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEFS FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court is reported at 390 F. Supp. 927. The opinion of the court of appeals (Pet. App. A 1a-27a) and the dissenting opinion of Chief Judge Bazelon in this case and in *American Society of Travel Agents, Inc.* v. *Blumenthal*, C.A.D.C., No. 75-1782, decided September 15, 1977 (Pet. App. B 41a-71a), are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1977. By order dated August 22, 1977, the

Chief Justice extended the time within which to file a petition for a writ of certiorari to November 12, 1977 and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether petitioners lack standing to challenge the correctness of published and private rulings of the Internal Revenue Service allowing foreign tax credits to oil companies for payments made to certain foreign countries in connection with oil extraction and production.

STATUTE INVOLVED

Section 901 of the Internal Revenue Code of 1954 (26 U.S.C.).

STATEMENT

Petitioner Tax Analysts and Advocates (TAA) is a nonprofit corporation organized for the purpose of promoting federal tax reform. Petitioner Thomas F. Field is the executive director of TAA. Petitioners instituted this action in the United States District Court for the District of Columbia seeking a declaratory judgment that published and private rulings of the Internal Revenue Service allowing foreign tax credits for taxes paid by American oil companies to certain foreign countries in connection with oil extraction and production in those countries [1] were contrary to Section 901(b) of the Internal Revenue Code of 1954 and therefore were unlawful.[2] Petitioners also sought a permanent injunction requiring the Internal Revenue Service to withdraw the rulings and to collect taxes from oil companies for all periods not barred by the statute of limitations in those cases in which foreign tax credits were claimed pursuant to the rulings (Pet. App. A 2a–3a).

After petitioners filed their complaint, petitioner Field purchased for approximately $2,000 the entire working interest in a Pennsylvania oil well producing three barrels of oil a month. Petitioners thereafter filed an amended complaint alleging that Field was a "domestic oil producer" who had suffered and would continue to suffer actual economic injury as a result of the rulings allowing foreign tax credits to United States oil companies operating abroad.

[1] The published rulings challenged by petitioners are Revenue Ruling 55–290, 1955–1 Cum. Bull. 380 (pertaining to taxes imposed by Saudia Arabia) and Revenue Ruling 68–552, 1968–2 Cum. Bull. 506 (pertaining to taxes imposed by Libya). The private rulings challenged permit tax credits for taxes imposed by Iran, Kuwait and Venezuela with respect to oil production in these countries (Pet. App. A 5a–6a).

On January 16, 1978, the Internal Revenue Service issued Revenue Ruling 78–63, which revoked Revenue Rulings 55–290 and 68–552, *supra*, with respect to Saudi Arabian and Libyan taxes paid or accrued after June 30, 1978. We are advised by the Internal Revenue Service that it is reconsidering the creditability of taxes paid to Iran, Kuwait, and Venezuela (the subject of the private rulings challenged by petitioners) in the light of the newly-issued Revenue Ruling 78–63. We are lodging a copy of Revenue Ruling 78–63 with the Clerk.

[2] Section 901(b) allows citizens of the United States and domestic corporations a tax credit for the amount of any income, war profits, or excess profits taxes paid to any foreign country. The basis of petitioners' complaint is their contention that the taxes imposed by the foreign countries covered by the rulings are in fact not taxes but royalties or excise taxes which are not creditable under Section 901.

Field asserted that he suffered discriminatory tax treatment as a result of the rulings because he is allowed only a deduction, rather than a credit, for the royalty payments he is required to make to the owner of the land upon which his well is located, while United States oil companies operating abroad receive tax credits for allegedly similar payments they make to the sovereign countries owning the land on which their oil wells are located. According to the amended complaint, the effect of this alleged discrimination was to increase the value of foreign oil well investments and decrease the value of domestic wells such as his own, and to enable the American companies producing oil abroad to charge a lower price for the foreign oil they sell in the United States, thereby lowering the market price for Field's domestic oil (Pet. App. A 6a–8a).

The government moved to dismiss petitioners' action on the ground that they lacked standing to challenge revenue rulings relating to the tax liabilities of third parties.[3] The district court held that neither petitioner had standing as a taxpayer to challenge the rulings (390 F. Supp. at 932–933). It also held that petitioner Field had no standing as an alleged competitor, since he had not demonstrated that the rulings in fact caused him injury (390 F.

[3] The government also asserted that the district court lacked jurisdiction because of the tax exception to the Declaratory Judgment Act, 28 U.S.C. 2201–2202, and the Anti-Injunction Act, 26 U.S.C. 7421, which bars injunctive actions against the assessment or collection of taxes. The district court, however, declined to rule on these contentions.

Supp. at 942–948), or that he was within the zone of interests that Section 901 of the Internal Revenue Code protects (*id.* at 942).

The court of appeals affirmed the district court's conclusion that neither petitioner TAA nor petitioner Field had standing to maintain the action (Pet. App. A 3a–4a). While the court of appeals held that petitioner Field had sustained "injury in fact," it did not decide whether there existed the requisite causal connection between the injury and the rulings of the Internal Revenue Service (Pet. App. A 10a–12a). Instead, the court concluded that petitioner Field had no standing because his competitive interest was not within the zone of interests of any relevant statute (Pet. App. A 13a–27a).[4]

ARGUMENT

1. The court of appeals correctly held that petitioner TAA did not have standing to maintain this action challenging the correctness of rulings issued by the Internal Revenue Service to third parties.

In *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, this Court rejected a similar claim of stand-

[4] In a similar suit brought by the American Society of Travel Agents (ASTA), challenging a ruling that allegedly gave overgenerous tax treatment to tax-exempt organizations sponsoring travel tours, the court of appeals likewise held that ASTA had no standing because it failed to show the requisite causation between its injury and the challenged ruling. *American Society of Travel Agents, Inc.* v. *Blumenthal*, C.A.D.C., No. 75–1793, decided September 15, 1977 (Pet. App. B 38a–40a). Chief Judge Bazelon filed a common dissent in both cases.

ing by several low-income individuals and organizations representing such individuals seeking to challenge the Internal Revenue Service policy of extending tax-exempt status to hospitals that did not provide indigents with a full range of hospital services to the extent of their financial ability. As the Court there stated, "Our decisions make clear that an organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III. *Sierra Club* v. *Morton*, [405 U.S. 727]; see *Warth* v. *Seldin*, [422 U.S. 490]." Since petitioner Tax Analysts and Advocates is simply an organization devoted to promoting its view of tax reform, it has no standing to challenge the correctness of any ruling issued by the Internal Revenue Service.[5]

2. Petitioner Field likewise has no standing to challenge the rulings at issue. As petitioners acknowledge (Pet. 8), this Court in *Data Processing Service* v. *Camp*, 397 U.S. 150, held that a plaintiff that challenged an agency ruling issued to a third party, on the ground that the ruling caused competitive injury to the plaintiff, must show that its competitive interest was within the "zone of interests to be protected or regulated by the statute * * * in question" (397 U.S. at 153). Accord: *Barlow* v. *Collins*, 397 U.S. 159.

[5] Petitioners do not challenge the conclusion of the district court (390 F. Supp. at 932–933), affirmed by the court of appeals (Pet. App. A 3a–4a), that they do not have standing as federal taxpayers. That holding is correct. See *Massachusetts* v. *Mellon*, 262 U.S. 447; *United States* v. *Richardson*, 418 U.S. 166; *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208.

After examining the purpose of the foreign tax credit provision of Section 901 of the Code, the court of appeals concluded that petitioner Field's competitive injury, arising from his ownership of an oil well in Pennsylvania, did not fall within the zone of interests that the statute protects or regulates.

Petitioners first argue (Pet. 8–9) that the zone of interests test is "dead." But since *Data Processing Service*, this Court has consistently reaffirmed the validity of that test. See, *e.g.*, *Sierra Club* v. *Morton*, *supra*, 405 U.S. at 733; *United States* v. *SCRAP*, 412 U.S. 669, 686 n. 13; *United States* v. *Richardson*, 418 U.S. 166, 176 n. 9; *Simon* v. *Eastern Ky. Welfare Rights Org.*, *supra*, 426 U.S. at 39 n. 19.

Contrary to petitioners' contention (Pet. 10), the Eighth Circuit did not reject the zone of interests test in *Park View Heights Corp.* v. *City of Black Jack*, 467 F. 2d 1208. There, the court held that a nonprofit corporation concerned with developing a federally-assisted housing project could assert the civil rights of certain individuals under 42 U.S.C. 1981–1982, and Section 815 of the Fair Housing Act of 1968, 82 Stat. 89, 42 U.S.C. 3615, because those statutes were designed to protect such interests (see 467 F. 2d at 1214). The court observed that it was dealing with standing under statutes that explicitly prohibited the conduct at issue rather than the situations in *Data Processing* and *Barlow*, where "statutory violations require[d] '[certain] public officials to perform certain functions according to the law' " (467 F. 2d at 1214 n. 7). Thus, while the court expressed its view

that "all that is required for a plaintiff to have standing to sue for a constitutional or a statutory violation is a showing of 'injury in fact,' " it stated it would "apply the rationale on 'standing' as recently discussed in Sierra Club v. Morton, *supra*" (*id.* at 1212 n. 4).

Alternatively, petitioners argue (Pet. 11–12) that the court of appeals misapplied the zone of interests test and that the maintenance of competitive fairness is one of the interests the Internal Revenue Code protects. Petitioners do not challenge the court of appeals' conclusion (Pet. App. A 22a–26a) that petitioner Field does not fall within the zone of interests that Section 901 of the Code, the statute providing the foreign tax credit, protects. Instead, petitioners urge that the court of appeals erred in failing to look to other provisions of the Internal Revenue Code, particularly Section 7805(b), which permits the Secretary to provide the extent, if any, to which any ruling or regulation shall be applied without retroactive effect.

But the Secretary's discretionary authority to issue rulings without retroactive effect has little to do with this lawsuit challenging the correctness of rulings issued pursuant to the foreign tax credit provision of Section 901, upon which petitioners' lawsuit was based. As the court of appeals correctly observed, "If litigants are allowed to transfer the Congressional purpose and intent embodied in one section of the Code into other contexts and situations regulated by different provisions of the Code, the possibilities for litigation would indeed be endless. We do not therefore believe that litigants can 'borrow' the

arguable regulatory or protective intent embodied in one provision of the Code and apply it to a provision where that intent is not evident, in order to satisfy the zone test" (Pet. App. A 18a).[6]

3. While the court of appeals did not reach the issue whether petitioner Field's competitive injury was caused by the challenged rulings and could be redressed in this lawsuit (Pet. App. A 11a–12a), the district court correctly held that there was no demonstrated nexus between their injury and the rulings. See *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40–46.

Here, it is wholly speculative whether the effect of the challenged rulings was to lower the price of foreign oil sold in the United States, and thereby lower the price petitioner Field could obtain for his domestic oil. The market price of foreign and domestic oil is a function of many interrelated and complex factors, not the least of which is foreign and United States governmental price regulation. While it is conceivable that revocation of the rulings might result in a price increase for foreign oil sold in the United

[6] *International Business Machines Corp.* v. *United States*, 343 F.2d 914 (Ct. Cl.), certiorari denied, 382 U.S. 1028, upon which petitioners rely (Pet. 11), is distinguishable. There, the issue was whether the Commissioner had abused his discretion in failing to limit the retroactive effect of a review ruling holding that certain computers manufactured by the taxpayer were subject to excise taxes. The court's determination that there was an abuse of discretion turned on the fact that the Internal Revenue Service had accorded favorable tax treatment to the only other manufacturer of the computers in question. The decision does not involve any consideration of the standing of a person whose taxes are not at issue to challenge the tax treatment of a third party.

States, it is equally conceivable that governmental regulation or economic conditions might preclude any increase in the price of such foreign oil. Moreover, it is by no means clear that the price of foreign crude oil directly affects the price petitioner Field can obtain for his oil. Field's well produces "high paraffin base Pennsylvania crude" (J.A. 54),[7] and it is well recognized that such Pennsylvania grade oil, because of its unique lubricating qualities, does not actively compete with crude oil produced elsewhere. See *United States* v. *Pennzoil Co.*, 252 F. Supp. 962 (W.D. Pa.).

Moreover, Field's further allegation that the effect of the rulings was to make foreign oil-well investments more valuable and domestic wells less valuable is equally speculative. Indeed, it is highly unlikely that revocation of the rulings would have any effect on the value of his particular well, with its minimal production capacity.

4. Finally, petitioners urge (Pet. 14) that the decision below must be overturned, because it might result in the nonreviewability of certain rulings of the Internal Revenue Service. But apart from the litigation Congress authorized to review the assessments of the Commissioner by refund suits or Tax Court proceedings, this Court has recognized that persons whose own taxes are not at issue cannot generally challenge the rulings of the Secretary of the Treasury with respect to third parties. See, *e.g.*, *Louisiana* v. *McAdoo*, 234 U.S. 627; *Simon* v. *Eastern Ky. Welfare Rights Org.*, *supra*.

[7] "J.A." references are to the joint appendix filed in the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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